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No. 02-460

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAVID SCHNEIDER,

Petitioner,

vs.

GORDON R. ENGLAND, SECRETARY OF THE NAVY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

BENEDON & SERLIN
GERALD M. SERLIN*
[SBN 123421]
DOUGLAS G. BENEDON
[SBN 110197]
21700 Oxnard Street,
Suite 1290
Woodland Hills, California
91367
(818) 340-1950

LAW OFFICES OF JOSEPH M. LOVRETOVICH
JOSEPH LOVRETOVICH
[SBN73403]
21700 Oxnard Street,
Suite 1750
Woodland Hills, California
91367
(818) 593-6300

**Counsel of Record*

Attorneys for Petitioner David Schneider

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The decision by the United States Court of Appeals for the Ninth Circuit creates an intercircuit conflict which threatens the consistency of federal law. The brief for the Respondent confirms the existence of this intercircuit conflict. Resolution by this Court is critical in achieving a uniform procedure in "mixed cases," involving both whistleblower retaliation and discrimination claims.

LEGAL DISCUSSION

The plain statutory language of 5 U.S.C. § 7702 establishes that following an adverse agency decision, the employee has the option in a "mixed case" complaint of filing a civil action in the district court rather than appealing to the Merit System Protection Board ("MSPB"). This is so because the statute provides, "[t]he decision of the agency in any such matter shall be a judicially reviewable action *unless* the employee appeals the matter to the [Merit Service Protection] Board." 5 U.S.C. § 7702, subd. (a)(2)(B), emphasis added.

Prior to the Ninth Circuit Court of Appeals' decision, every other court to consider application of this section has followed the statute's plain meaning. See, e.g., *Wells v. Shalala,* 228 F.3d 1137, 1142 (10th Cir. 2000); *Mullins v. Cromwell,* 228 F.3d 1305, 1312 (11th Cir. 2000); *Doyal v. Marsh,* 777 F.2d 1526, 1535-1536 (11th Cir. 1985); *Quinn v. West,* 140 F.Supp.2d 725, 734 (W.D. Tex. 2001).

Legal commentators have likewise uniformly interpreted the statute by applying its plain meaning. See, e.g., Burdens of Proving Handicap Discrimination Using Federal

Employment Discrimination Law: Rational Basis or Undue Burden, 1989 Det. C.L. Rev. 1053, 1071 ("When an employee presents a claim of discrimination before the district court, the court has jurisdiction over the civil service claim even if the civil service claim has not been presented to the [Merit System Protection] Board").

In reliance upon the express statutory language, the statute's uniform interpretation by courts, and the statute's uniform interpretation by commentators, Petitioner David Schneider filed his mixed case complaint in the district court after the Navy Equal Employment Office failed to issue a timely determination of his action. In contradistinction to every other court which has considered this issue, the Ninth Circuit Court of Appeals resolved that Petitioner had failed to exhaust his administrative remedies. The Court then buried its decision in a two-page unpublished memorandum decision. Pet. App. 1-2.

Respondent acknowledges that the legal authority cited by Petitioner holds the "district court review in these circumstances must encompass *both* the discrimination claim, which has been administratively exhausted under [the Civil Service Reform Act], *and* the personnel action, which has *not* been exhausted as required under the CSRA." Opp. 14-15, original emphasis. Respondent nonetheless maintains that the decisions cited by Petitioner are wrong.[1] Opp. 14-16.

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[1] For example, Respondent observes, "[t]he decisions cited by petitioner from other courts of appeals do not address the statutory arguments discussed above and, in particular, do not discuss what

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Respondent is mistaken. As explained in the petition, the conclusion that an appeal to the MSPB is not a prerequisite to filing an action in the district court makes sense. As the court of appeals recognized in *Christo v. Merit Systems Protection Board,* 667 F.2d 882, 883 (10th Cir.1981), "the various statutory provisions of the Act and its legislative history indicate a clear Congressional preference for combining various aspects of a single agency determination under one review proceeding, both in the administrative and judicial channels." See also *Wall v. United States*, 871 F.2d 1540, 1545-46 (10th Cir.1989) (Seymour, J., dissenting) (To obtain judicial review in a "mixed case," an employee may file suit in federal district court after final agency action, "whether the final agency action consists of resolution of a mixed case by the Board, or rejection of the claim by claimant's agency").

To force a plaintiff to bifurcate his case and return to the administrative process for further consideration of his retaliation claim would frustrate principles of judicial economy and serve no useful purpose. See *Woodman v. Runyon,* 132 F.3d 1330, 1342 (10th Cir.1997); cf. *Tolliver v. Deniro,* 790 F.2d 1394, 1396 (9th Cir. 1986) (For reasons of judicial economy, interests of the litigants and legislative history, the Court of Appeals refused to bifurcate improper discharge claims from racial discrimination claims).

As Respondent confirms, Congress intended to create a uniform federal procedure for personnel actions. Here,

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standard of review the district court could apply in reviewing a personnel action wihout the benefit of the record or an adjudication by the MSPB or indeed, as in this case, without the benefit of any administrative record." Opp. 16.

the Ninth Circuit has diverged from it. The published decisions from the Tenth and Eleventh Circuits, as well as from the district court in the Fifth Circuit, have uniformly authorized employees – following rejection of a mixed case complaint by the employing agency – to file civil actions in the district court rather than first appealing to the MSPB. If these courts are wrong, this Court must tell employees what the law is. If these courts are right, then Petitioner's right to due process and fundamental fairness have been violated by a rogue Ninth Circuit Court of Appeals' unpublished memorandum decision which has reached a contrary resolution. Again, this Court must speak.

In sum, this Court should grant certiorari to resolve the intercircuit conflict and eliminate uncertainty in the interpretation of 5 U.S.C. § 7702. See, e.g., *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602 (2001) (Certiorari granted to review unpublished *per curiam* opinion to resolve intercircuit conflict).

CONCLUSION

For the reasons set forth in the petition and in this reply, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

Dated: January 3, 2003

Respectfully submitted,

LAW OFFICES OF JOSEPH LOVRETOVICH
JOSEPH LOVRETOVICH

BENEDON & SERLIN
GERALD M. SERLIN
DOUGLAS G. BENEDON

Attorneys for Petitioner
David Schneider